CARGILL, INCORPORATED A

v.

PENDAFTAR CAP DAGANGAN

HIGH COURT MALAYA, KUALA LUMPUR B
UMI KALTHUM ABD MAJID J
[ORIGINATING SUMMONS NO: 24IP-1-01-2013]
23 AUGUST 2013

TRADE MARKS: *Registration - Application for registration of trade mark - Appeal against refusal of registration - Application to register "POULTRY FOCUS" mark for non-medicated animal feeds - Whether word invented - Whether there was direct reference to character or quality of goods - Whether mark distinctive - Trade Marks Act 1976, ss. 10(1)(c), (d), (e), 25(5)* C

The plaintiff applied to the Registrar of Trademarks ('the registrar') to register the trade mark 'POULTRY FOCUS' ('the mark') in Class 31 in respect of 'non-medicated animal feeds'. The defendant objected to the plaintiff's application on the grounds that: (i) the mark was not an invented word and therefore did not comply with s. 10(1)(c) of the Trade Marks Act 1976 ('the Act'); (ii) the mark comprised words having direct reference to the character or quality of the goods for which registration was sought, namely non-medicated animal feeds and therefore did not comply with s. 10(1)(d) of the Act; and (iii) the mark was not distinctive as its meaning had a direct reference to the character or quality of the goods for which registration was sought namely 'non-medicated animal feeds' and therefore, did not comply with s. 10(1)(e) of the Act. The plaintiff thus brought this appeal pursuant to s. 25(5) of the Act against the decision of the Registrar. The defendant had in fact registered the plaintiff's trade marks 'AQUA FOCUS' and 'PORK FOCUS' in respect of 'non-medicated feeds'. D E F G

Held (allowing appeal):

(1) The mark was an invented word within the meaning of s. 10(1)(c) of the Act. The combination of the words 'POULTRY' and 'FOCUS' might allude to the product sold by the plaintiff, but by themselves these words together could not *per se* be said to describe the said product as the word 'FOCUS' had no real connection to the said product. This combination of the two words does not exist in the English language. (para 16) H

(2) The court did not accept the defendant's submission that the combination of these words was not inventive since the defendant had seen it fit to register the plaintiff's trade marks in 'PORK FOCUS' and 'AQUA FOCUS' under Class 31. (para 17) I

(3) The mark had no direct reference to the character or quality of the plaintiff's goods for which the registration was sought, namely 'non-medicated animal feeds'. Even if the mark did somewhat refer to the character or quality of the goods, it was an indirect one and therefore permissable to be registered under s. 10(1)(d) of the Act. (para 28)

(4) The mark was distinctive within the meaning of s. 10(1)(e) read together with the definition of 'distinctive' in s. 10(2A) of the Act. The defendant had failed to make a distinction between the common use of the word 'POULTRY' as against the juxtaposition of the words 'POULTRY FOCUS', which was not only an inventive word but also distinctive of the plaintiff's goods. The mark was in larger font from that of the words 'Cargill Animal Nutrition' and therefore it was a distinctive mark in itself in respect of specific goods or range of goods offered by the plaintiff. (para 34)

(5) Since the mark was distinctive, there was no need for the plaintiff to prove there existed a secondary meaning to 'POULTRY FOCUS'. (para 35)

(6) The mark had satisfied that it was an invented mark under s. 10(1)(c) of the Act, and/or it had no direct reference to the character or quality of the goods under s. 10(1)(d) of the Act, and/or it was a distinctive mark under s. 10(1)(e) of the Act. The said mark was therefore registrable under any of the said provisions of the Act. (para 36)

Case(s) referred to:

Illinois Tool Works, Inc v. Pendaftar Cap Dagangan, Malaysia [2010] 3 CLJ 837 HC ***(refd)***

In the Matter of American Screw Coy's Application No. 773, 098 for the Registration of a Trade Mark [1959] RPC 344 ***(refd)***

In the matter of an application by the Diamond T Motor Car Company to Register a Trade Mark [1921] 38 RPC 373 ***(refd)***

In the Matter of Application by W & G Du Cross Ld for the Registration of Trade Marks [1913] 30 RPC 660 ***(refd)***

In the Matter of an Application of the Eastman Photographic Materials Company, Ld, For a Trade Mark [1898] 15 RPC 476 ***(refd)***

Oze Marketing Sdn Bhd v. Twenty First Century Products Sdn Bhd [1999] 4 CLJ 823 HC ***(refd)***

Philippart v. Whiteley Ld [1908] 25 RPC 565 ***(refd)***

Procter and Gamble Company v. OHIM [2002] RPC 17 ***(refd)***

Service Master (M) Sdn Bhd v. MHL Servicemaster Sdn Bhd & Anor [1998] 1 CLJ 459 HC ***(refd)***

Wembley Gypsum Products Sdn Bhd v. MST Industrial Systems Sdn Bhd [2007] 6 CLJ 228 CA ***(refd)***

Yong Sze Fan & Anor v. Sharifah Mohd Tamin & Ors [2008] 8 CLJ 613 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 87
Trade Marks Act 1976, ss. 10(1)(a), (b), (c), (d), (e), 10(2A), 25(3), (5), 27
Trade Marks Regulations 1997, reg. 75(1)

For the plaintiff - Jamini Rajeswaran (Soh Peng Hui with her); M/s Sreenevasan
For the defendant - Iylia Hashim; Perbadanan Harta Intelek Malaysia

Reported by Amutha Suppayah

JUDGMENT

Umi Kalthum Abd Majid J:

The Appeal

[1] This is the plaintiff's appeal pursuant to s. 25(5) of the Trade Marks Act 1976 ('the Act') and O. 87 of the Rules of Court 2012 against the decision of the Registrar of Trade Marks ("the Registrar") dated 11 December 2012 wherein the Registrar had refused the plaintiff's Trade Mark Application No. 02008431 to register the trade mark "Poultry Focus" in Class 31 in respect of "non-medicated animal feeds".

[2] The originating summons (encl. 1) filed by the plaintiff prays for the following orders:

(i) an order that the decision of the Registrar dated 11 December 2012 pursuant to s. 25(3) of the Act refusing the plaintiff's Trade Mark Application No. 02008431 for "Poultry Focus" in Class 31 in respect of non-medicated animal feeds be set aside;

(ii) an order that the Trade Mark Application No. 02008431 be accepted by the Registrar;

(iii) an order that the Trade Mark Application No. 02008431 be advertised in the prescribed manner pursuant to s. 27 of the Act;

(iv) in the event that the above prayers are granted, a copy of this order be served on the Registrar in accordance with reg. 75(1) of the Trade Marks Regulations 1997; and

(v) costs.

A **Background**

[3] On 17 July 2002 the plaintiff applied to the Registrar to register the trade mark "Poultry Focus" in Class 31 in respect of "non-medicated animal feeds" ('the plaintiff's application').

B **[4]** The defendant objected to the plaintiff's application *vide* letter dated 6 November 2003 on the grounds that the plaintiff's application did not comply with the Act, in particular the following reasons:

(i) the proposed trade mark was not an invented word and therefore did not comply with s. 10(1)(c) of the Act;

C

(ii) the proposed trade mark comprised of words having direct reference to the character or quality of the goods for which registration was sought namely non-medicated animal feeds and therefore did not comply with s. 10(1)(d) of the Act; and

D

(iii) the proposed trade mark was not distinctive as its meaning has a direct reference to the character or quality of the goods for which registration was sought namely "non-medicated animal feeds" and therefore did not comply with s. 10(1)(e) of the Act.

E **[5]** The plaintiff *via* letter dated 13 November 2003 responded to the defendant's objections stating that the objections were without merits. The defendant maintained their objections against the plaintiff's application based on s. 10(1)(c), (d) and (e) of the Act *vide* letter dated 28 October 2005 but gave opportunity to the plaintiff to request for a F hearing. On 25 January 2006 the plaintiff requested for a hearing to be held in respect of defendant's objections to the plaintiff's application. The hearing took place on 5 May 2010.

[6] *Vide* letter dated 31 May 2010, the defendant informed the plaintiff G that the plaintiff's application was refused as it did not satisfy the requirements of s. 10(1) of the Act ("the decision"). In para. 48 at p. 16 of the grounds of decision the learned Penolong Pendaftar Cap Dagangan stated his decision as:

> H Cap dagangan pemohon bukanlah perkataan yang direkacipta tetapi merupakan perkataan kombinasi perkataan biasa iaitu POULTRY dan FOCUS yang terdapat di dalam kamus. Cap dagangan pemohon juga merujuk secara langsung kepada barangan yang dipohon pemohon. Cap dagangan POULTRY FOCUS juga adalah tidak distintif kerana gagal mencapai status 'secondary meaning'. Oleh yang demikian, permohonan ini sewajarnya ditolak kerana tidak memenuhi kehendak I Seksyen 10 ACD 1976.

The Decision

[7] For ease of reference the provisions of s. 10(1) of the Act is reproduced below:

> (1) In order for a trade mark (other than a certification trade mark) to be registrable it shall contain or consist of at least one of the following particulars:
>
> (a) the name of an individual, company or firm represented in a special or particular manner;
>
> (b) the signature of the applicant for registration or of some predecessor in his business;
>
> (c) an invented word or words;
>
> (d) a word having no direct reference to the character or quality of the goods or services not being, according to its ordinary meaning, a geographical name or surname; or
>
> (e) any other distinctive mark.

[8] It is not disputed that the plaintiff's proposed mark "Poultry Focus" does not fall within s. 10(1)(a) and (b) of the Act. Only one condition is needed to be satisfied for the proposed mark to be considered registrable (see *Yong Sze Fan & Anor v. Sharifah Mohd Tamin & Ors* [2008] 8 CLJ 613; [2008] 7 MLJ 803). I will then consider whether the plaintiff's proposed mark can be registrable under s. 10(1)(c), (d), and/or (e) of the Act.

Section 10(1)(C) - An Invented Word Or Words

[9] The plaintiff submitted that the trade mark "Poultry Focus" is an invented word and therefore registrable under s. 10(1)(c) of the Act. In support of its contention, the plaintiff relied on the case of *Illinois Tool Works Inc v. Pendaftar Cap Dagangan Malaysia* [2010] 3 CLJ 837; [2009] 9 MLJ 101, where His Lordship Ramly J held that, at p. 847 (CLJ); p. 111 (MLJ), paras. 35 and 37:

> [35] What this means is that an invented word can have a meaning as long as the meaning is not obvious and does not deprive members of the trade from using it to describe the character or quality of the goods.
>
> ...
>
> [37] Therefore, an application may be allowed under the law to have some meaning in its mark and that meaning is acceptable if it is a covert and skilful allusion to the character or quality of the goods.

> What this means is that the meaning of the mark is not so obvious to the character or quality of the goods. If the trademark has an indirect meaning (covert and skilful allusion) it is permissible.

[10] It was submitted that whilst 'poultry' and 'focus' are common English words, they are nevertheless an invented word when combined together as the combination does not convey an obvious meaning and does not deprive the members of the trade from using it to describe the character or quality of the goods. It is trite law that a trade mark must be considered as a whole (see *Illinois Tool works Inc (supra)* and *In the matter of an application by the Diamond T Motor Car Company to Register a Trade Mark* [1921] 38 RPC 373). The word "focus" is not a word commonly or normally used with the word "poultry" in the English language. The defendant himself had admitted that the combination cannot be found in the dictionary (para. 19, pages pp. 139-140, AR of grounds of decision). It was further submitted that "Poultry Focus" is in fact an unusual juxtaposition and is not a familiar, common, normal or usual combination or expression in the English language whether in relation to "non-medicated animal feeds" or otherwise and that the word 'poultry' is not one which would be used with the word 'focus'. As such when used together, "POULTRY FOCUS" does not convey an obvious meaning, even though it may convey a covert and skillful allusion which is permissible as illustrated in *Illinois Tool Works, Inc*'s case *(supra)*.

[11] This unusual juxtaposition of words, it was submitted, is not a combination of words that any trader would seek to use to describe "non-medicated animal feeds". It therefore will not deprive any members of the trade from using it to describe the character or quality of the goods. The defendant in fact had acknowledged that there is no evidence of other traders using the combination "Poultry Focus" (para. 17, p. 139, AR, grounds of decision). The Court of Appeal case of *Wembley Gypsum Products Sdn Bhd v. MST Industrial Systems Sdn Bhd* [2007] 6 CLJ 228; [2007] 7 MLJ 193 was cited as the authority on the trade marks "Pinhole", "Sakura" and "Fissured" were invented words as they were substantially new when first used by the respondent.

[12] Also, the defendant had in fact registered the plaintiff's trade marks "Aqua Focus" and "Pork Focus" in respect of "non-medicated feeds" which in itself establishes that such combinations are registrable under s. 10(1)(a) of the Act. The case of *Illinois Tool Woks, Inc (supra)* was cited to stress this point, where the learned J had held, at p. 854 (CLJ); pp. 117-118 (MLJ), para. 69, that:

> [69] ... the registrar had already accepted (in 2002) that the appellant's trademark was indeed distinctive, inventive and had no direct reference to the character or quality of the goods (silicone). This fact is therefore relevant and significant. The registrar had

summarily dismissed the fact that the appellant has already secured registration and proprietorship of its trade mark 'HIGH TEMP RED' *via* its registered trademark No. 02005833. This would render the registrar's refusal to register the appellant's registration of its current trademark irrational and the court is obliged to interfere to rectify this mistake.

[13] It was the submission of the defendant that the words "Poultry Focus" is not an invented word as the word conveys an obvious meaning to the ordinary man which is directly describing the plaintiff's goods. When both words "Poultry Focus" are read together as a whole, it is too obvious that the words would be understood and perceived as "focusing on poultry". This is due to the word "Focus" which is laudatory in nature that further emphasise the meaning of the word "Poultry" instead of deriving a new or different meaning. Reference was made to the decision of Lord Herschell in the House of Lords' case of *In the Matter of an Application of the Eastman Photographic Materials Company Ld, For a Trade Mark* [1898] 15 RPC 476 at p. 485, lines 35-44, as follows:

... I don't think the combination of two English words is an invented word, even although the combination may not have been in use before, nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form ...

[14] The defendant submitted that when the two words "Poultry Focus" are put next to each other it would surely compute a meaning in the minds of of the public as "focusing on poultry". Therefore these words cannot be invented words as invented words do not carry any meaning based on the decision of Parker J in *Philippart Whiteley Ld* [1908] 25 RPC 565. I am unable to accept this reference by the defendant as the case quoted is not in the bundle of authorities of the defendant. Further, the word "Poultry" means "animal" (as in "chickens, turkeys, ducks and geese" based on its definition in the Oxford Dictionary, Thesaurus and Wordpower Guide) whilst the word "Focus" when put next to it does not create any less impact for the word to be perceived as "Poultry", and in this manner "Poultry" directly describes the defendant's goods. There is no covert or skilful allusion in this application to enable the plaintiff's mark "Poultry Focus" to be registered.

[15] Even though the defendant admitted that the word "Poultry Focus" cannot be found appearing side by side in the English dictionary, the defendant submitted that it does not change the fact that these

words when read together convey an obvious meaning which is directly describing the goods of the plaintiff contrary to the requirements of the law *vis* s. 10(1)(c) of the Act.

[16] I am more inclined to agree with the submissions of the plaintiff. I am of the view that the proposed trade mark "Poultry Focus" is an invented word within the meaning of s. 10(1)(c) of the Act. The combination of the words "Poultry" and "Focus" may allude to the product sold by the plaintiff, but of themselves these words together cannot *per se* be said to describe the said product as the word "Focus" has no real connection to the said product (see *Illinois Tool Works, Inc (supra)*). This combination of the two words does not exist in the English language. It is therefore not surprising that no other persons in the trade have seen it fit to use the same combination of words to describe their products nor to apply for their marks to be registered using the same combination of words (see *Wembley Gypsum Products Sdn Bhd (supra)*).

[17] I am also unable to accept the submission of the defendant that the combination of these words is not inventive since the defendant had seen it fit to register the plaintiff's trade marks in "Pork Focus" and "Aqua Focus", under Class 31 pursuant to Trade Mark Registration No. 02008434 and No. 02008437 respectively (see exh. 'A-10', affidavit affirmed by Kwan Chew Yung on 27 February 2013, encl. 4). Puan Badiah binti Abbas, the Assistant Registrar of Trade Marks, in para. 14 of her affidavit in reply affirmed on 7 February 2013 (encl. 3) had averred that there are other traders who are interested to use the words "Poultry" and "Focus" either as a whole or separately and had tendered several exhibits in exh. 'D-2' as her evidence of this averment. Upon my perusal of her exhibits, what is mainly common in the mark registered/to be registered is, except for "Pork Focus", the use of the word "Poultry", as in "Poultry Food Mixture" (withdrawn), "Ipi Integrated Poultry Industry" (renewal pending), "Pork Focus" (registered), "Rose Poultry" (under examination), "TMC Butchery Pork.Beef.Lamb.Poultry" (under consideration), "PPNJ Poultry & Meat Sdn Bhd" (registered), "Poultrystar" (registered), and "Trimix Poultry Concentrate" (withdrawn). None of these exhibits showed the mark to be a combination of two words "Poultry Focus". Incidentally, the owner of the registered trade mark "Pork Focus" is the plaintiff itself.

[18] I would echo the words of Ramly J in the case of *Illinois Tool Works, Inc (supra)* as quoted in para. 12 above when His Lordship thought it was relevant and significant fact, as I find in this case, that the Registrar had already accepted in 2002 that the appellant's trade mark was distinctive, inventive and had no direct reference to the

character or quality of the goods. When the Registrar had refused to register the appellant's registration of its current trade mark, His Lordship found, as I find in this case, the refusal as irrational and the court is obliged to interfere and rectify the mistake.

Section 10(1)(d) - A Word Having No Direct Reference To The Character/Quality Of Goods

[19] It was submitted for the plaintiff that the trade mark "Poultry Focus" has no direct reference to the character or quality of the goods for which the registration is sought for, namely "non-medicated animal feeds". It is not a word according to its original meaning a geographical name or surname and it is thus registrable under s. 10(1)(d) of the Act. The trade mark "Poultry Focus" does not convey that the plaintiff's animal feeds are of good quality or that they are nutritional from the perspective of "nutritional concentration, ingredient digestibility and effective medication" or that they had greater advantages and benefits as compared to other animal feeds and as alleged by the defendant in paras. 31, 32 of the grounds of decision, p. 143, AR.

[20] If the trade mark "Poultry Focus" refers to the character or quality of the goods, it is an indirect one as opposed to direct, and based on *Illinois Tool Works, Inc (supra)*, the trade mark is registrable under s. 10(1)(d) of the Act. Reference was also made to the case of *In the Matter of American Screw Coy's Application No.773, 098 for the Registration of a Trade Mark* [1959] RPC 344, where Lloyd-Jacob J held at p. 346 that "direct reference corresponds in effect to aptness for normal description". In that case, His Lordship had held that whilst the trade mark "Torque-set" was not intrinsically devoid of reference to the character of its goods, namely screws, bolts, rivets and studs and fastening devices, such would not amount to "direct reference" to the character or quality of the goods.

[21] Since it has been shown that no other traders have used this combination of words (para. 17, grounds of decision, p. 139, AR), the registration of "Poultry Focus" by the plaintiff will not deprive any members of the trade from using it to describe the character or quality of the goods, as a combination it is not apt for the normal description of the goods in question.

[22] Further, since the defendant had in fact registered the plaintiff's trade marks "Aqua Focus" and "Pork Focus" in respect of "non-medicated animal feeds", the said registration in itself establishes that such combinations are registrable under s. 10(1)(d) of the Act.

[23] For the defendant, it was submitted that the word "Poultry Focus" is directly referring to the character of the plaintiff's goods which are directly related to poultry or animal.

[24] Further, due to the laudatory nature of the word "Focus", it inadvertently means that the words "Poultry Focus" when coined together are interrelated to each other with the connotation of "focusing on poultry". That words which are descriptive or words having direct reference to the goods are common property and therefore cannot be monopolised by any person as held by Lord Herschell in *In the Matter of an Application of the Eastman Photographic Materials Co Ld (supra)* p. 484:

> ... The vocabulary of the English language is common property; it belongs alike to all; and no one ought to be permitted to prevent the other members of the community from using, for purposes of description, a word which has reference to the character or quality of the goods.

[25] Therefore, the defendant submitted that the words "Poultry Focus" are common English words and cannot be monopolised solely by the plaintiff.

[26] The defendant then referred to the instances where traders in the poultry industry had applied to register trade marks bearing the words "Poultry Focus" and which I have referred to earlier in para. 15 above. It was the defendant's submission that the instances referred to show that many traders intend to use the word "Poultry" in respect of their products and therefore the word "Poultry" should not be monopolised by the plaintiff only.

[27] Once again I am more inclined to accept the plaintiff's submission on this aspect for the reasons I have earlier alluded in respect of s. 10(1)(c) of the Act. I am of the view that the Assistant Registrar in his grounds of decision at paras. 31 and 32, p. 143 AR, had given an interpretation of the two words which far exceed the understanding/ meaning of the combination of the two words "Poultry Focus" when he stated as follows:

> 31. Sekiranya orang awam melihat cap dagangan Poultry Focus, orang awam akan segera mengetahui bahawa barangan yang diniagakan adalah makanan ternakan binatang. Orang awam juga akan segera tahu bahawa jika mereka memilih barangan pemohon, mereka akan dapat makanan ternakan yang berkualiti dan berkhasiat dari segi nutritional concentration, ingredients digestibility, effective medication dan sebagainya. Di dalam industri penternakan ayam umpamanya pemakanan yang berzat akan dapat memberi kesihatan yang baik yang menghasilkan pembesaran anak ayam yang maksima.

> 32. Perkataan Poultry Focus yang bermaksud Memfokuskan Untuk Penternakan sememangnya merujuk kepada sifat barangan yang diniagakan pemohon. Meletakkan perkataan Focus setelah perkataan Poultry tidak lain adalah untuk memberi gambaran atau menunjukkan makanan binatang pemohon mempunyai banyak kelebihan dan kebaikan berbanding dengan makanan binatang yang lain di pasaran.

[28] Even by a stretch of the imagination, I am unable to agree with his interpretation of the said words. I agree with the submission of the plaintiff that "Poultry Focus" has no direct reference to the character or quality of the plaintiff's goods for which the registration is sought, namely "non-medicated animal feeds". Even if the trade mark "Poultry Focus" does somewhat refer to the character or quality of the goods, it is an indirect one and therefore permissible to be registered under s. 10(1)(d) of the Act (see *Illinois Tool Works, Inc (supra)* and *In the Matter of American Screw Coy's Application (supra)*).

Section 10(1)(e) - Any Other Distinctive Mark

[29] The word "distinctive" has been defined in s. 10(2A) of the Act as:

> ... in relation to the trade mark registered or proposed to be registered in respect of goods or services, means the trade mark must be capable of distinguishing goods or services with which the proprietor of the trade mark is or may be connected in the course of trade from goods or services in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered, subject to conditions, amendments, modifications or limitations, in relation to use within the extent of the registration.

[30] It was the plaintiff's submission that the trade mark "Poultry Focus" is distinctive within the meaning of the said definition and thus registrable under s. 10(1)(e) of the Act. Reference was made to the House of Lords case of *In the Matter of Application by W & G Du Cross Ltd for the Registration of Trade Marks* [1913] 30 RPC 660 per Lord Parker at pp. 671-672, who held that:

> ... in order to determine a mark is distinctive it must be considered quite apart from the effects of registration. The question, therefore, is whether the mark itself, if used as a Trade Mark, is likely to become actually distinctive of the goods of the persons so using it. The applicant for registration in effect says, "I intend to use this mark as a Trade Mark, ie, for the purpose of distinguishing my goods from the goods of other persons, "and the Registrar or the Court has determine, before the mark be admitted to registration, whether it is of such a

A kind that the applicant, quite apart from the effects of registration, is likely or unlikely to attain the object he has in view. The applicant's chance of success in this respect must, I think, largely depend upon whether other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark, or some mark nearly resembling it, upon or in connection with their own goods ...

[31] Reference was also made to the American case of *Procter and Gamble Company v. OHIM* [2002] RPC 17 where it was held that:

> In order to assess whether a word combination such as BABY-DRY is capable of distinctiveness, it is therefore necessary to put oneself in the shoes of an English-speaking consumer. From that point of view, and given that the goods concerned in this case are babies' nappies, the determination to be made depends on whether the word combination in question may be viewed as a normal way of referring to the goods or of representing their essential characteristic in common parlance ...
>
> Whilst each of the two words in the combination may form part of expressions used in everyday speech to designate the function of babies' nappies, their syntactically unusual juxtaposition is not a familiar expression in the English language, either for designating babies' nappies or for describing their essential characteristics.
>
> Word combinations like BABY-DRY cannot therefore be regarded as exhibiting, as a whole, descriptive character; they are lexical inventions bestowing distinctive power on the mark so formed and may not be refused registration ...

[32] The plaintiff therefore submitted that the trade mark "Poultry Focus" is inherently distinctive for the following reasons:

(i) the combination "Poultry Focus" is in fact an unusual juxtaposition syntactically and is not a familiar, common, normal or usual combination or expression in the English language whether in relation to "non-medicated animal feeds" or otherwise;

(ii) when used together, "Poultry Focus" does not convey a direct reference to the character or quality of the goods namely "non-medicated animal feeds" as it is a combination which is apt for the normal description of "non-medicated animal feeds";

(iii) no other traders has used this combination of words;

(iv) no other trader is likely in the ordinary course of business and without improper motive to desire to use the same mark;

(v) refuting the defendant's contention, that the plaintiff's trade mark "Poultry Focus" cannot function as a trade mark and is thus not distinctive as when compared to the words "Cargill Animal Nutrition" on the plaintiff's packaging, the plaintiff's trade mark "Poultry Focus" on the plaintiff's packaging is in larger font than "Cargill Animal Nutrition" as can be seen clearly in the packaging at pp. 151-153, exh. 'A-9', Plaintiff's Affidavit No. 1. Further, it is common for products to bear a house mark as well as another trade mark used specifically for a particular product or range of products, for example, "Nestle" is the house mark, whilst "Nutren", "Kit Kat", "Milo", and "Coffee-Mate" are other trade marks used for different products offered. So in this case, "Cargill Animal Nutrition" is clearly the house mark whilst "Poultry Focus" clearly functions as a trade mark in respect of specific goods or range of goods;

(vi) the fact that the defendant had registered the plaintiff's trade marks "Aqua Focus" and "Pork Focus" in respect of "non-medicated animal feeds" in itself establishes that such combinations are registrable under s. 10(1)(e) of the Act.

[33] For the defendant, it was submitted that the plaintiff mark "Poultry Focus" is highly descriptive of the goods and is prone to be used by other traders in the poultry industry. Therefore the plaintiff's mark "Poultry Focus" is not inherently capable of distinguishing from its goods. Further, it was submitted that the said words which are descriptive cannot be distinctive unless such words have acquired a secondary meaning (*Service Master (M) Sdn Bhd v. MHL Servicemaster Sdn Bhd & Anor* [1998] 1 CLJ 459; [1998] 5 MLJ 378; *Oze Marketing Sdn Bhd v. Twenty First Century Products Sdn Bhd* [1999] 4 CLJ 823; [1999] 4 MLJ 449), and this the plaintiff has failed to prove that its trade mark has achieved a secondary meaning. The defendant therefore submitted that the plaintiff's mark cannot be distinctive and does not qualify to be registered under s. 10(1)(e) of the Act.

[34] I agree with the submissions of the plaintiff that the plaintiff's mark "Poultry Focus" is distinctive within the meaning of s. 10(1)(e) read together with the definition of "distinctive" in s. 10(2A) of the Act. Once again the defendant had failed to make a distinction between the common use of the word "Poultry" as against the juxtaposition of the words "Poultry Focus" as claimed to be the trade mark of the plaintiff, which I find to be not only an inventive word but also distinctive of the plaintiff's goods. Exhibit 'A-9' of the plaintiff's affidavit-in-support is evidence of the plaintiff's usage of the said trade mark on its packaging

of animal feeds. I agree that the mark "Poultry Focus" is in larger font from that of the words "Cargill Animal Nutrition" and therefore it is a distinctive mark in itself in respect of specific goods or range of goods offered by the plaintiff.

[35] As I find that the plaintiff's mark is distinctive, there is no need for the plaintiff to prove there exists a secondary meaning to "Poultry Focus".

Conclusion

[36] For the reasons stated above, I allow the plaintiff's appeal and the prayers sought in the originating summons with no order as to costs. I hold that the plaintiff's mark has satisfied that it is an invented mark under s. 10(1)(c) of the Act, and/or it has no direct reference to the character or quality of the goods under s. 10(1)(d) of the Act, and/or it is a distinctive mark under s. 10(1)(e) of the Act. The said mark is therefore registrable under any of the said provisions of the Act.